

R.D. # 0010-01
Montvale, NJ

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

ESPLANADE MONTVALE, LLC¹
Employer

and

CASE 22-RC-12099

LOCAL 69, H.E.R.E, AFL-CIO²
Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,³ the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer (sometimes also referred to as the Hotel) is engaged in commerce within the meaning of the Act and it will

¹ The name of the Employer appears as amended at the hearing.

² The name of the Petitioner appears as amended at the hearing.

³ Briefs filed by the Employer and the Petitioner were fully considered.

effectuate the purposes of the Act to assert jurisdiction herein.⁴

3. The Petitioner (sometimes also referred to as the Union), the labor organization involved, claims to represent certain employees of the Employer.⁵

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act for the reasons described

infra:

All full-time and regular part-time employees, including front desk clerks, sales employees, maintenance employees, maintenance supervisors, housekeeping employees, cooks, banquet captains, bartenders, lounge managers, banquet waiters, dishwashers, servers and wait staff, bus boys and kitchen helpers employed by the Employer at its Montvale, New Jersey facility excluding all office clerical employees, accounting employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

⁴ The parties stipulated, and I find, that the Employer owns a hotel located in Montvale, New Jersey, the only facility involved herein. The parties further stipulated, and I find, that during the upcoming twelve months, the Hotel expects to derive gross revenue in excess of \$500,000. During the same period of time, the Employer expects to purchase and cause to be delivered to its Montvale, New Jersey facility goods and services valued in excess of \$50,000 directly from suppliers located outside the State of New Jersey. As such, the Employer meets the Board's jurisdictional standards for a hotel and is an employer within the meaning of the Act. *Penn-Keystone Realty Corp.*, 191 NLRB 800 (1971).

⁵ The status of the Petitioner as a labor organization within the meaning of Section 2(5) of the Act will be discussed, *infra*.

The Employer declined to stipulate that the Petitioner is a labor organization under the Act. With regard to the labor organization status of the Petitioner, there are essentially only two requirements for a party to meet to achieve the status of a labor organization as defined by Section 2(5) of the Act: first, it must be an organization in which employees participate; and second, it must exist for the purpose, in whole or in part, of dealing with employers concerning wages, hours, and other terms and conditions of employment. *Alto Plastics Manufacturing Corp.*, 136 NLRB 850 (1962). In this regard, the record reveals that employees have participated in the Petitioner by maintaining membership and paying dues.⁶ The record also discloses that the Petitioner deals with employers concerning wages, hours and working conditions, has collective bargaining agreements with various employers and maintains a strike fund for the benefit of employees it represents. In these circumstances, I find the Petitioner to be a labor organization under Section 2(5) of the Act. *Ana Colon, Inc.* 266 NLRB 611, 612; *Alto Plastics Manufacturing Corp.*, *supra*.

The record reveals that the Employer owns a hotel located in Montvale, New Jersey.⁷ In dispute in this proceeding are whether seven (7) front desk and two (2) office clerical employees should be included in the appropriate unit and whether the lounge manager and maintenance supervisor are statutory supervisors.

⁶ Further, I have taken administrative notice that in other cases involving the Petitioner evidence revealed that employees have participated in the Petitioner with respect to serving on its executive board and negotiating committees and aiding in formulating and ratifying collective bargaining agreements.

⁷ The record does not reveal the total number of employees at the Hotel.

The front desk employees consist of 4 front desk clerks and 3 front desk shift supervisors. The Petitioner contends, contrary to the Employer, that all 7 of these front desk employees should be excluded from the unit.⁸ The Employer contends, contrary to the Union, that the office clericals, specifically Josephina Pelayo-Lat and Susan Malz, should be included in the directed unit as they assertedly share a community of interest with other unit employees. The Employer further contends and the Union disputes that certain employees are supervisors within the meaning of the Act, specifically, the lounge manager (Steve Sarno) and the maintenance supervisor (Rafael Moran).

At the hearing, the parties agreed that the maintenance employees, housekeeping employees, cooks, banquet captains, bartenders, banquet waiters, dishwashers, servers and wait staff, bus boys and kitchen helpers should be included in any directed unit. The parties also agreed that managerial employees, guards and supervisors as defined in the Act should be excluded from any agreed-upon unit.

I now turn to the classifications and employees in dispute.

1. The Front Desk Employees

The record reveals that front desk employees give out room keys, register hotel guests, accept guest payments, coordinate which rooms are vacant and take messages and requests from guests. Their duties require frequent interaction on a daily basis with housekeeping, maintenance, and food and beverage staff in accommodating the

⁸ No evidence was presented, and the Petitioner does not contend here, that the employees classified "shift supervisors" are statutory supervisors within the meaning of the Act. Rather, the Petitioner seeks to exclude all 7 front desk employees on the same basis, specifically, their alleged lack of community of interest with the remainder of the unit.

needs of the hotel guests. The front desk employees are directly supervised by the Front Desk Manager,⁹ who in turn reports to the General Manager. The record further revealed that all but two of the front desk employees are paid hourly, as are the bulk of employees in the unit sought, with starting pay of \$9 per hour ranging up to \$9.85 per hour, placing them in the mid-range of salaries among the employees in the unit.¹⁰ Front desk employees receive the same benefits as the other Hotel employees. Front desk employees also wear uniforms as do the bulk of employees in the unit sought.

In the hotel industry, the Board has applied the same traditional community of interest criteria used in other industries. The Board considers such factors as “the distinctions in skills and function of particular employee groups, their separate supervision, the employer’s organizational structure and differences in wages and hours as well as integration of operation and employee interchange and contact.” *The Westin Hotel*, 277 NLRB 1506, 1508 (1986); see generally, *Atlanta Hilton & Towers*, 273 NLRB 87, 90 (1984), modified on other grounds, 275 NLRB 1413 (1985), and *77 Operating Co.*, 160 NLRB 927, 929-30 (1966), enforced, 387 F. 2d 646 (4th Cir. 1967). The integral issue here is whether the front desk employees share a community of interest with the petitioned-for employees to such a degree as to render their exclusion from the unit inappropriate.

⁹ At the time of the hearing, the Front Desk Manager position was vacant, and the Assistant Front Desk Manager had assumed those duties. The parties stipulated that both these positions are supervisory within the meaning of the Act.

¹⁰ Kitchen employees start at \$8.50 per hour, ranging up to \$11.50 per hour; housekeeping employees start at \$6.50 per hour, ranging up to \$6.85 per hour; bartenders make from \$4.25 to \$6.50 per hour plus tips.

Here, the front desk employees wear uniforms, interact with hotel guests and handle money as do the bulk of the employees in the unit sought. They frequently interact with housekeeping, maintenance, and food and beverage employees, on a daily basis, to meet the needs of the hotel guests including filling in or covering for the bellhop when he is unavailable.¹¹ Their pay scale is within the same range as those of other employees in the proposed unit and most are paid hourly as are the bulk of unit employees.¹² Based upon the above and the record as a whole, noting that these factors weigh in favor of including them in the unit, I find that the front desk employees share a sufficient community of interest with other unit employees warranting their inclusion in the appropriate unit found herein.

2. The Office Clericals

There are two clerical employees whose inclusion is in dispute, Josephina Pelayo-Lat and Susan Malz. Pelayo-Lat testified at the hearing but Malz did not.

Pelayo-Lat is the accounts receivable clerk for the Hotel. She reports to the Comptroller, who performs her functions when she is out.¹³ Pelayo-Lat earns \$24,000 annually, is a salaried employee and does not punch a clock. She stated that the only employees in the Hotel who do not wear uniforms are the managers and herself. Her office is located on the second floor of the hotel, unlike the front desk, bar, restaurant and banquet rooms, all of which are located on the first floor. Although she

¹¹ Unlike in *Dinah's Hotel & Apartments*, 295 NLRB 1100 (1989), the unit sought by the Petitioner here includes banquet captains, bartenders, banquet waiters, servers and wait staff, who all share the front desk employees' function of interacting directly with hotel guests.

¹² Although at least two of the front desk "shift supervisors" may be paid on a salaried basis, this factor alone does not vitiate what otherwise is a clear community of interest with the employees in the unit.

¹³ No other employee in the proposed unit reports to the Comptroller.

apparently receives the same benefits as the bulk of the employees in the unit sought, Pelayo-Lat has the additional fringe benefit of eating free meals in the guest restaurant.¹⁴ Her interaction with hotel guests is infrequent at most, arising only when a guest disputes charges on a bill. There was no evidence that she interacts with other employees as a function of her job at all. Inasmuch as her skills and functions, direct supervision, wage rate and structure are clearly distinct from the employees in the proposed unit and her interaction with other employees is almost nonexistent, in part due to her workplace being physically removed from the rest of the unit, I find that the accounts receivable clerk does not share a sufficient community of interest with other unit employees warranting her inclusion in the appropriate unit found herein. Thus, Pelayo-Lat will be excluded from the unit.

Susan Malz is paid hourly and earns \$11.00 per hour. She works part-time, approximately 30 hours per week. Like the bulk of proposed unit members she punches a time clock. Her office is immediately behind the front desk and she frequently emerges from that office to deal directly with hotel guests when necessary. Since, according to Pelayo-Lat, only managers and Pelayo-Lat herself do not wear a uniform, presumably, Malz wears a uniform as well. Malz reports to two supervisors, the sales manager and the catering manager, and is responsible for making sure the contracts and paperwork are in order for banquets scheduled at the Hotel. Inasmuch as she is supervised in part by the catering manager along with other unit employees, punches a clock, is paid an hourly wage in line with other unit employees and works

¹⁴ Though asserting that all employees enjoy this fringe benefit, Pelayo-Lat admitted never having seen anyone from housekeeping or maintenance taking advantage of this benefit, and the Petitioner's witness stated that other employees did not have this privilege.

physically proximity to other unit employees, I find that the sales secretary shares a sufficient community of interest with other unit employees warranting her inclusion in the appropriate unit found herein. Thus, Susan Malz will be included in the unit.

3. The Supervisory Issues

a. The Lounge Manager

Steve Sarno is the Hotel lounge manager, and has been since approximately April 2001, when the position was created. Prior to that time, there had been a food and beverage director at the Hotel, a position which is now vacant. Sarno did not testify. The lounge manager is the head bartender. He is in charge of inventory in the bar and also prepares the schedule for himself and 3 other bartenders.¹⁵ He reports to the general manager. Sarno works 3 shifts a week for a total of about 20 hours per week, and tends bar on the 3 days he works. Sarno is paid hourly, as are the three other bartenders. Sarno makes \$6.50 per hour plus tips, while the other bartenders make between \$4.25 and \$6.50 per hour plus tips.

According to Employer's witness, former comptroller Anup Pillai, the lounge manager has the authority to recommend disciplinary action to the general manager, though Pillai conceded that Sarno could not discipline or discharge an employee on his own. Disciplinary decisions at the Hotel are made by the general manager. Pillai also acknowledged that Sarno has not had any occasion to recommend any disciplinary action against anyone since being named lounge manager. Although

¹⁵ The record is silent as to what factors are considered or utilized in preparing the schedule.

Pillai also testified that Sarno has the authority to schedule overtime, the witness conceded that ultimately, the general manager must approve any overtime, and that typically overtime is dictated by the presence of customers after hours more so than by scheduling. There was no evidence that Sarno could compel an employee to work overtime. Additionally, although Pillai testified that Sarno can recommend employees for hire, there was no evidence that he had in fact done so.

Section 2(11) of the Act defines a supervisor as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

In *Providence Hospital*, 320 NLRB 717, 725 (1996), the Board held, "In enacting Section 2(11) of the Act, Congress distinguished between true supervisors who are vested with 'genuine management prerogatives,' and 'straw bosses, lead men and set-up men' who are protected by the Act even though they perform 'minor supervisory duties.'" *Id.* at 724 citing *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-81 (quoting S. Rep. No. 105, 80th Cong., 1st Sess., 4 (1947)). The legislative history instructs the Board not to construe supervisory status too broadly because an employee who is deemed a supervisor loses the protection of the Act. See *Providence Hospital*, *supra*, 320 NLRB at 725; *Warner Co. v. NLRB*, 365 F. 2d 435, 437 (3rd Cir. 1966), cited in *Bay Area-Los Angeles Express*, 275 NLRB 1063, 1073 (1985). While the possession of any one of the functions enumerated in Section 2(11) is sufficient to establish supervisory status, Section 2(11) requires that a supervisor must perform

those functions with independent judgment, as opposed to in a routine or clerical manner. *Bay Area-Los Angeles Express*, supra at 1073 and cases cited therein. The burden of proving supervisory status rests on the party contending that status.

Midland Transportation Co., 304 NLRB 4 (1991); *Tucson Gas & Electric Co.*, 241 NLRB 181 (1979). Absent detailed, specific evidence of independent judgment, mere inference or conclusory statements without supporting evidence are insufficient to establish supervisory status. *Quadres Environmental Co.*, 308 NLRB 101, 102 (1992)(citing *Sears Roebuck & Co.*, 304 NLRB 193 (1991)). Further, whenever evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, the Board will find that supervisory status has not been established on the basis of those indicia. *The Door*, 297 NLRB 601 (1990)(quoting *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989)). It is well established that an employee's title, standing alone is not indicative of supervisory status for purposes of the Act. *John N. Hansen Co.*, 293 NLRB 63 (1989); *Waterbed World*, 286 NLRB 425 (1987).

The Employer claims that the lounge manager exhibits sufficient indicia of supervisory status to justify excluding him as a statutory supervisor. The Employer maintains that Sarno “oversees” three employees, and can effectively recommend discipline; that he prepares the schedule and maintains inventory for the lounge; and that he actively participates in hiring. The Board in *Providence Hospital* quoted with approval the court in *NLRB v. Security Guard Service*, 384 F. 2d 143, 151(5th Cir. 1967):

If any authority over someone else, no matter how insignificant or infrequent, made an employee a supervisor, our industrial composite would be

predominantly supervisory. Every order-giver is not a supervisor. Even the traffic director tells the president of a company where to park his car.

There was no showing that independent judgment was required to “oversee” the other bartenders. Indeed, the record did not reveal when if ever Sarno was present for other bartenders’ shifts so as to oversee them in any respect. Rather, Sarno came in on his three regular bartending shifts, and in the absence of a food and beverage manager since April 2001, has been given the title lounge manager, and the additional duties of taking inventory and creating the bartenders’ schedule.¹⁶

Nor does Sarno's preparing the bartenders’ schedule constitute "responsible direction" within the statutory sense. "Responsible direction" connotes accountability. *Providence Hospital, supra* at 727-30. There was no evidence that the lounge manager was held responsible for the service of other bartenders. Additionally, Pillai’s assertion that Sarno can schedule overtime, with approval from the general manager, is belied by Pillai’s admission that overtime is generally governed by the presence of customers at the bar. Likewise, taking and/or maintaining inventory is considered a routine function that does not require independent judgment.

I further find that the conclusory testimony on behalf of the Hotel as to the ability of the lounge manager to discipline and/or hire employees is negated by the evidence that the lounge manager has never in fact disciplined an employee, recommended employee discipline, hired an employee, or recommended an

¹⁶ The record is not entirely clear that these two duties were new to Sarno, or who was previously charged with these duties.

employee's hire. Supervisory authority can not be found based on an alleged authority that has not in fact been exercised. *Northwest Steel*, 200 NLRB 108 (1972).

The evidence does not establish that Sarno uses the independent judgment in executing supervisory tasks that is required for a finding of supervisory status under the Act. There was no evidence that Sarno uses independent judgment in scheduling. Indeed, it was acknowledged that Sarno cannot even schedule overtime without the permission of the general manager. Work assignments made to equalize employees' work on a rotational or other rational basis are routine assignments. *Ohio Masonic Home*, 295 NLRB 390, 395.(1989). See also *Sears Roebuck & Co.*, 304 NLRB 193, 194 (1991) (writing out a schedule without needing to resolve conflicts or problems concerning the availability of employees does not justify a finding of supervisor). Nor is there persuasive evidence that Sarno uses independent judgment in overseeing employees, or that Sarno has authority to effectively recommend discipline or hire.

Finally, though secondary to the statutory indicia, I note that the wage differential between the lounge manager and the other bartenders is more characteristic of the difference between a nonsupervisory leadperson's differential. Sarno earns \$6.50 per hour, a wage that takes into account his seniority among bartenders at the Hotel. Other bartenders receive from \$4.25 to \$6.50 per hour. The minimum wage for bartenders is \$4.25 per hour, plus tips. There was no evidence in the record that his current wage is more than his bartender's wage had been prior to his gaining the lounge manager title. For all of the foregoing reasons, I find that the lounge manager, Steve Sarno, is not a supervisor within the meaning of the Act and, therefore, the lounge manager will be included in the unit.

(b) The Maintenance Supervisor

Rafael Moran is the maintenance supervisor, and has been since his promotion to that position in April 2001. Other than Moran, there is only one other full-time maintenance employee. Moran did not testify. Pillai testified that Moran has the authority to recommend discipline of employees by writing them up, and giving his write-up to the general manager. The record does not reflect whether any discipline has ever resulted from any recommendation made by Moran. Pillai further testified that Moran is in charge of evaluating the other maintenance employee, though he has not yet done so, and the one employee for whom Moran allegedly has this duty is not due to be evaluated until August. Indeed, the Employer concedes in its brief that Moran has not exercised any indicia of supervisory authority to date.

Upon being named maintenance supervisor in the newly-created position in April 2001, Moran became a salaried employee making \$2,200 monthly. Although he is supposed to work an eight-hour day, he is expected to work more hours if necessary. Even based on a straight 40-hour week, however, Moran's hourly rate would be approximately \$12.75. The other full-time maintenance employee earns \$11.50 per hour, or only about ten percent less than Moran.

I find insufficient evidence that the maintenance supervisor uses independent judgment in assigning employees. Nor can I conclude on the basis of this record that Moran has authority to discipline or to recommend discipline. In the absence of any other statutory indicia, I decline to find that Rafael Moran, the maintenance supervisor, is a statutory supervisor. Therefore, the maintenance supervisor will be included in the unit.

DIRECTION OF ELECTION¹⁷

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to issue subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained the status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by **Local 69, H.E.R.E., AFL-CIO**.

¹⁷ As the unit found appropriate is larger than that requested, the Petitioner is accorded a period of 14 days in which to submit any additional showing of interest to support an election, if necessary. In the event the Petitioner does not wish to proceed to an election it may withdraw its petition without prejudice by notice to the undersigned within seven (7) days from the date of this Decision and Direction of Election. *Folger Coffee*, 250 NLRB 1 (1980).

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with undersigned, who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the NLRB Region 22, 5th Floor, 20 Washington Place, Newark, New Jersey 07102, on or before July 5, 2001. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by July 11, 2001.

Signed at Newark, New Jersey this 27th day of June, 2001.

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